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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN CHARLES MOBLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARONSON AND RIDDET
A Law Corporation
900 N. Broadway, Suite 600
Santa Ana, California 92701

GERALD H. GOLDSTEIN
GOLDSTEIN, GOLDSTEIN & HILLEY
2900 Tower Life Building
San Antonio, Texas 78205

Attorneys for Petitioner,
Alan Charles Mobley

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTIONS PRESENTED

1. WHETHER A DISTRICT COURT MAY FIRST HOLD A HEARING ON AN AFFIANT'S CREDIBILITY BEFORE CONDUCTING A *FRANKS V. DELAWARE* HEARING WHERE THE MOVING PAPERS MAKE A SUBSTANTIAL SHOWING THAT A FALSE STATEMENT WAS MADE KNOWINGLY OR WITH RECKLESS DISREGARD FOR THE TRUTH?

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INTERESTED PARTIES-

1. Alan Charles Mobley.
2. United States of America.

The following related cases exists:

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USA v. Mark Steven McFarlane	84-5333
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USA v. Farhad Rokni	84-5338
USA v. Clifford Bruce Casey	84-5341
USA v. Edgar Ramierz	84-unk.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, ALAN CHARLES MOBLEY, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals [attached hereto as Appendix A], is unreported.

The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1986. A suggestion for reconsideration and rehearing en banc was denied January 15, 1987 [attached hereto as Appendix B]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) by timely filing this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner, ALAN CHARLES MOBLEY, was charged with twenty-seven other persons in an 85 count indictment. The Government's primary evidence was secured by court-approved wiretaps obtained upon the affidavit of FBI Agent Wylie B. Cox. The initial wiretap was issued on November 8, 1983, and later extended four times, the subsequent affidavits incorporated by reference the first affidavit filed by Agent Cox.

Petitioner Mobley pleaded not guilty, and on August 6, 1984, filed a motion for suppression of evidence under Title 18 United States Code, Section 2518 and *Franks v. Delaware*, 438 U.S. 154 (1978) and a request for an evidentiary hearing thereon. This motion was sup-

ported by the declaration of Richard G. Sherman, Counsel for Co-defendant Restrepo, with exhibits annexed thereto [E.R. pp. 58-111]. In response to this motion the Government filed an opposition supported by declarations and exhibits [E.R. pp. 336, 347, 435-494, 615-622]. The defendants filed a reply brief [E.R. pp. 534-618] and a motion for the production of one Scott Marzahl and the declaration of Richard G. Sherman [E.R. pp. 634-648].

The Petitioner's motion for suppression was denied on September 13, 1984 [R.T. p. 74]. On September 19, 1984, the Petitioner entered a conditional plea of guilty, reserving the right to appeal the denial of this motion for suppression of evidence [R.T. B, pp. 78-87]. On November 5, 1984, the District Court sentenced Petitioner Mobley, who was twenty three years old and had no prior record, to the maximum allowable punishment of forty-five years in prison with a special parole term of life. A timely notice of appeal was filed on November 10, 1984. A panel of the Ninth Circuit Court of Appeals affirmed the District Court on November 3, 1986. A petition for rehearing en banc was denied on January 15, 1987.

STATEMENT OF FACTS

On November 8, 1983, FBI Agent Wylie B. Cox applied to District Judge Richard A. Gadbois, Jr., for a wiretap on the telephone of Alan and Aleyda Mobley.

On December 7, 1983, Judge Gadbois renewed the authorization for 30 days, and on January 11, 1984, he again extended the authorization. Interceptions were made from December 7, 1983 to January 5, 1984 and from

January 11, 1984 to January 16, 1984, when Alan Mobley moved his residence and interception was ceased.

On February 28, 1984, United States District Judge Edward Rafeedie authorized wiretaps on Petitioner Alan Mobley's apartment and office. The affidavits for these interceptions incorporated by reference the first affidavit filed by Agent Cox.

The core of the Government's case against Petitioner Mobley and his co-defendants consisted of tape recorded conversations overheard by the FBI.

AFFIDAVITS FOR WIRETAPS MUST COMPLY WITH 18 U.S.C. § 2518(1)(c)

As Agent Cox was well aware, to comply with 18 U.S.C. § 2518(1)(c), an application for a wiretap must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous".

If the District Judge then finds that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous", the wiretap may be issued. 18 U.S.C. § 2518(1)(c).

THE COX AFFIDAVIT

In the instant case, Agent Cox attempted to show why "normal investigative techniques have been tried and have failed or reasonably appear unlikely to succeed" (18 U.S.C. § 2518(1)(c)), by averring in part:

> 211. "I and other Special Agents of the FBI and DEA have given consideration to the infiltration of

> this criminal organization by undercover agents. However, based on my experience in investigating this illegal drug operation, and others, and the experience of other Special Agents of the FBI and DEA knowledgeable in this type of investigation, it does not appear that this investigative method would be likely to succeed in this case. As mentioned above, *confidential Sources 1, 2, and 3 deem it too physically dangerous for themselves to attempt to introduce undercover agents to members of the ALAN CHARLES MOBLEY drug conspiracy.* Without help of cooperating individuals who have the confidence of ALAN CHARLES MOBLEY and the others, it would be very difficult, if not impossible, to infiltrate this organization."

What Agent Cox didn't tell Judge Gadbois is that there were two potentially viable investigatory options; Patty Lehtola (source no. 2); and Scott Marzahl (source no. 6).[1]

PATTY LEHTOLA (CONFIDENTIAL SOURCE NUMBER 2)

As the defense suspected, "confidential source number 2" was Patty Lehtola, the widow of slain drug dealer Barclay Hodges. Hodges sold cocaine for Alan Mobley [1 RT 62, ll. 13-18] and at the time of his death, allegedly owed Alan Mobley approximately $350,000.00. [ER 618].

Believing Mobley was responsible for Barclay Hodges death, Ms. Lehtola met with officers of the Orange County Sheriff's Department in November of 1982, in an effort to revenge herself for Hodges' death. At this interview,

---

1. The Government confirmed during the court proceedings that "Source no. 2" was Patricia Lehtola and "Source no. 6" was Scott Marzahl. [ER 501].

Ms. Lehtola told of Hodges' relationship with Alan Mobley in the cocaine business.

Another interview was scheduled on December 10, 1982, and a third on December 14, 1982. Both interviews were taped, and the tapes turned over to FBI Agent Cox [ER 618] who listened to them shortly after they were made. [2 RT 136, l. 24 - p. 137, l. 4].

It is undisputed that on December 10 and 14, 1982, confidential informant #2, Patty Lehtola, offered to introduce undercover police officers to Alan Mobley. [ER 655, 663]. Moreover, Agent Cox admitted at the suppression hearing he listened to the tape recordings of Patty Lehtola make that very offer in January of 1983, approximately a month after she made it and approximately 9 months before Agent Cox applied for the wiretaps. [2 RT p. 136, l. 24 - p. 137, l. 4].

Although aware of Ms. Lehtola's offer of assistance, Agent Cox stated in his original affidavit, and repeated in three succeeding applications, that ". . . confidential Sources 1, 2, and 3 deem it too physically dangerous for themselves to attempt to introduce undercover agents to members of the Alan Charles Mobley drug conspiracy".

SCOTT MARZAHL (CONFIDENTIAL SOURCE NUMBER 6)

Other deliberate misrepresentations contained in the affidavits and applications supporting the authorization for the wiretaps came to light during the proceedings in the district court.

The Government in the first and second orders with supporting applications and affidavits, swore to the Court under the penalty of perjury that Marvin Scott Marzahl

was a subject of the requested electronic surveillance and a primary suspect in the Mobley investigation.

> "13(a) There is probable cause to believe that ALAN CHARLES MOBLEY, ALEYDA MACHADO-MOBLEY, HERIBERTO PUERTA-MACHADO, WILLIAM CHARLES McCAHILL, ROBERT L. FEES, *SCOTT MARVIN MARZAHL*, CLIFFORD BRUCE CASEY, and others as yet unknown, have committed and are committing: (1) the following violations of Title 21, United States Code:" [There are here listed a series of federal violations].
>
> * * *
>
> "In particular, the communications to be intercepted will concern the dates, times, places, schemes, and methods of importing, selling, buying, bringing, possessing, concealing, delivering, distributing, or paying for controlled substances when ALAN CHARLES MOBLEY, ALEYDA MACHADO-MOBLEY, HERIBERTO PUERTA-MACHADO, WILLIAM CHARLES McCAHILL, ROBERT L. FEES, SCOTT MARVIN MARZAHL, CLIFFORD BRUCE CASEY, and others yet unknown, communicate with their co-conspirators, aiders and abettors in this illegal controlled substance possession, importation, and distribution operation, thereby identifying the co-conspirators, aiders and abettors of ALAN CHARLES MOBLEY, ALEYDA MACHADO-MOBLEY, HERIBERTO PUERTA-MACHADO, WILLIAM CHARLES McCAHILL, ROBERT L. FEES, SCOTT MARVIN MARZAHL, CLIFFORD BRUCE CASEY, and others yet unknown, their places of operation, their sources of supply of illegal drugs, the financiers, managers, and supervisors of their drug distribution operation." [ER 582].

As Agent Cox was aware, this was simply not true; Mr. Marzahl was at that time a cooperating informant

for law enforcement, as Agent Cox admitted in court. [2 RT 141, ll. 3-20].

MOTION TO SUPPRESS AND REQUEST FOR AN EVIDENTIARY HEARING

The defendants filed motions to suppress the evidence obtained from the wiretaps and sought an evidentiary hearing based upon the misrepresentations and omissions in the Cox affidavit concerning Patty Lehtola and Scott Marzahl. [ER 58-111; 210-319].

The motions to suppress challenged the veracity of the affidavit in support of the initial wiretap and subsequent extensions; particularly the statements of Agent Cox that "source 2" would not consent to introduce undercover agents to Mobley because of her fear of him, and that it would be "difficult, if not impossible" to infiltrate the organization.

The motions to suppress were supported by proof in the form of a sworn affidavit by attorney Richard Sherman [ER 60-70], a memorandum of interview with Patty Lehtola [ER 71-80], and a sworn declaration by Patty Lehtola, which adopted the statements of the Sherman declaration and the memorandum of interview [ER 540-543].

DISTRICT COURT STATED IF LEHTOLA'S DECLARATION WAS "VALID" A *FRANKS* HEARING WOULD BE CONDUCTED

The District Court rejected the Government's argument that "if the information regarding Source Two were deleted from the affidavit, abundant probable cause would remain". [ER 466, 467]. The District Court stated that

if Lehtola's declaration was "valid", a *Franks v. Delaware* hearing would have to be conduct. [1 RT 42-46].

A hearing was thereafter conducted with the issues specifically limited to whether or not the declaration of Lehtola was credible, and not whether the affidavit of Mr. Cox was materially false. [1 RT 51].

At the conclusion of this hearing, the Court found Lehtola not credible, in spite of the fact that she was described in the Cox affidavit as a reliable informant and had been a Government witness in a federal prosecution several months prior thereto. The Court also found that the factual showing on the Marzahl issue was insufficient and denied the defendants' motions for an evidentiary hearing and suppression of evidence.

REASONS GRANTING THE PETITION

This case presents the question of whether a District Court may first hold a hearing on whether an affiant is credible before conducting a *Franks v. Delaware* hearing when the moving papers are sufficiently definite, specific, detailed and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING THE PETITIONER'S MOTION TO SUPPRESS EVIDENCE OBTAINED BY WIRETAPS WITHOUT CONDUCTING AN EVIDENTIARY HEARING PURSUANT TO *FRANKS V. DELAWARE*

In *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978), this Court detailed the require-

ments a defendant must meet to obtain an evidentiary hearing to challenge the veracity of a search warrant.

> "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portions of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons . . .
>
> . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required."

The *Franks* decision stressed that if a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, the fruits of the search may be excludable. *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 67 (1978).

> "Put another way, if a search warrant affidavit contains a material misstatement made intentionally or with reckless disregard for the truth, the court should excise the offensive language from the affidavit and determine whether the remaining portion establishes probable cause." *U.S. v. Namer,* 680 F.2d 1088 at 1093 (5th Cir. 1982).

CLEAR PROOF OF RECKLESSNESS IS NOT REQUIRED

The Court of Appeals below has held that an evidentiary hearing cannot be denied if "the moving papers

are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question. . . ." *U.S. v. Ledesma,* 499 F.2d 36, 39 (9th Cir.), *cert. denied,* 419 U.S. 1024, 95 S. Ct. 501, 42 L.Ed.2d 298 (1974).

And in *U.S. v. Stanert,* that court held:

> "*Clear proof* of deliberate or reckless omission is *not* required. Such proof is reserved for the evidentiary hearing. At this stage, all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." (Emphasis supplied) *U.S. v. Stanert.* 762 F.2d 775, 781 (9th Cir. 1985).

While the burden of proof for a "substantial showing" is not defined, it obviously must be *less* than a preponderance of the evidence, for that is the standard to *prevail* in a *Franks* hearing. *U.S. v. Kiser,* 716 F.2d 1268, 1274 (9th Cir. 1983).

Moreover, case law in this jurisdiction has expressly rejected the Government's contention that a suppression hearing adequately provides a forum for the *Franks* issues.

> "The Government suggests that Kiser's opportunity to question Miller at the suppression hearing was a satisfactory substitute for a *Franks* hearing. We disagree. Kiser's attorney questioned Miller after the district court had denied Kiser's motions for a *Franks* hearing and for disclosure, and those rulings necessarily circumscribed the line of questioning." *U.S. v. Kiser,* 716 F.2d 1268, 1273 n. 5 (9th Cir. 1983).

THE DEFENDANTS PROVIDED A "SUBSTANTIAL SHOWING"

It is apparent that the court below considered the moving papers to be sufficiently detailed and nonconjectural as to provide a "substantial showing". The lower court's concern was whether Ms. Lehtola's declaration was "credible".

> THE COURT: "I won't proceed until I make a determination as to whether—that's the only basis, Mr. Sherman, upon which there will be any Franks versus Delaware hearing. Otherwise there is no basis in the papers that have been filed by any defendant for a hearing other than the declaration of Miss Lehtola.
>
> I have to make a determination as to whether or not that declaration is factually true." [1 RT p. 44].

The court again stated its position as follows, in response to a request by defense counsel to address the subject of Lehtola's declaration:

> THE COURT: "I have indicated what my situation is now. My situation now is that, at least in my view of the law, that if Miss Lehtola's declaration stands up there is to be a hearing. If not, no hearing. Okay?" [1 RT p. 46].

THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *FRANKS*

The procedure engaged in by the court below has no precedent therefor known to the Petitioner. In fact, said procedure flies in the face of that provided by the United States Supreme Court in *Franks v. Delaware, supra,* and

its progeny. All of the legal precedent in this area requires that where the defendant makes a substantial showing that a false statement was made knowingly or with reckless disregard for the truth in a wiretap application, and such statement is necessary to a finding of probable cause, a hearing is required. If at the hearing the defendants' allegations are established then the false statements must be stricken and the affidavit re-examined for validity. This test applies to the necessity requirement for granting a wiretap order. 18 U.S.C. § 2518. *U.S. v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985).

The purpose of a *Franks v. Delaware* hearing is primarily to determine whether or not statements in the wiretap application are deliberately or recklessly false, and not whether the person making such allegations of Government falsity on behalf of the defense is a "credible" person which was the very procedure used in the court below. In this case, the entire focus of the hearing was on Lehtola's credibility and not whether Cox's statements in the affidavit supporting the application were true or false. Such a procedure has no basis or place in our jurisprudence, especially in a case where the declarant has a history of being a reliable informant and a truthful Government witness.

CONCLUSION

In light of the substantial issues raised, Petitioner respectfully prays this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

ARONSON AND RIDDET
A Law Corporation
900 N. Broadway, Suite 600
Santa Ana, California 92701

GERALD H. GOLDSTEIN
GOLDSTEIN, GOLDSTEIN & HILLEY
2900 Tower Life Building
San Antonio, Texas 78205

By: _____
GERALD H. GOLDSTEIN
State Bar No. 08101000

Attorneys for Petitioner,
Alan Charles Mobley

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.	84-5331	84-5337
	84-5332	84-5338
	84-5333	84-5341
	84-5334	84-5348
	84-5336	85-5060

D.C. No. CR 84-516-MR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM McCAHILL, et al.,
Defendants-Appellants.

(Filed January 15, 1987)

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding
Argued and Submitted September 3, 1986
Pasadena, California

MEMORANDUM*

Before: SCHROEDER, CANBY and THOMPSON,
Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Ten of the defendants[1] in this case have appealed their convictions for drug-related offenses. All entered conditional pleas of guilty, reserving the right to challenge on appeal the district court's denial of their motion to suppress wiretap evidence. They contend court orders authorizing wiretaps were obtained in violation of 18 U.S.C. § 2518 and that the district court should have granted a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). They argue: (1) the declarations and offers of proof filed by Patricia Lehtola and Richard Sherman satisfied the requirement of a "substantial preliminary showing" and entitled them to a full *Franks* hearing; and (2) the hearing held in the district court on September 6, 7 and 13, 1984 was not such a hearing. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

A.

Preliminary Showing for Franks Hearing

To obtain a *Franks* hearing on a motion to suppress evidence obtained by wiretap, the defendants must make a substantial preliminary showing that: (a) the affidavit(s) offered in support of the wiretap application contained intentionally or recklessly false or misleading statements or omissions; and (b) the misrepresentations were material to the district court's finding that the wiretap was necessary. *See, e.g., United States v. Ippolito*, 774 F.2d 1482, 1485-87 (9th Cir. 1985); *United States v. Lefkowitz*, 618 F.2d 1313, 1317 (9th Cir.), *cert. denied*, 449 U.S. 824 (1980). An evidentiary hearing is

1. Alan Charles Mobley, Mark Steven McFarlane, Belen Puerta Machado, Luis Javier Restrepo, John Jairo Montoya, Edgar Jose Ramirez, Clifford Bruce Casey, Farhad Rokni, William McCahill, Ronald Gene Congelliere.

required only "if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." *United States v. Licavoli*, 604 F.2d 613, 621 (9th Cir. 1979) (*quoting United States v. Ledesma*, 499 F.2d 36, 39 (9th Cir.), *cert. denied*, 419 U.S. 1024 (1974)), *cert. denied*, 446 U.S. 935 (1980). "Conclusory" allegations or offers of proof do not satisfy the requirement of a substantial preliminary showing. *Id. See also Franks*, 438 U.S. at 171; *United States v. Chesher*, 678 F.2d 1353, 1360 (9th Cir. 1982); *accord United States v. Stanert*, 762 F.2d 775, 781-83 (9th Cir. 1985).

The defendants allege that Special Agent Wylie Cox falsely stated in his November 1983 and subsequent affidavits that: (a) Source 2 (Lehtola) had indicated she would not "consent to wear a consensual monitoring device or introduce undercover agents to the subject [of the investigation] because of . . . fear of Alan Charles Mobley and others" and fear for her personal safety; (b) Source 6 (Scott Marzahl) was afraid to testify, could not infiltrate the Mobley organization, and was the subject of the FBI investigation; (c) the wiretaps were necessary because the confidential sources were unwilling and unable to introduce undercover agents to members of the Mobley organization. The defendants contend that these statements were "recklessly or intentionally" false and were material to a finding of necessity for the wiretaps.

In support of their allegations, the defendants offered a declaration dated August 6, 1984 from Richard Sherman which was incorporated into a later declaration

by Patricia Lehtola dated September 4, 1984. The Sherman-Lehtola declarations alleged that: (a) between July of 1981 and the spring of 1982 Lehtola became "very familiar with Alan Mobley, his family, and persons he bought from and sold to as well as his method of operation in the cocaine business" because of her association with Barclay Hodges and "business and personal relationship with Mobley;" (b) Lehtola had given information to police in November 1982 and January 1983; (c) agent Cox "was aware" that Lehtola did not fear Mobley, that she was "intimately familiar with Mobley's entire operation," and that she wanted to make undercover buys from Mobley, introduce undercover officers to Mobley, and work as an informant; (d) agent Cox "was made aware" by local police that Lehtola was unhappy with her "passive role" in the Mobley investigation and Cox failed to answer her calls; and (e) Cox intentionally avoided talking to Lehtola in order to meet the "necessity" requirement to obtain a wiretap. In a declaration dated September 5, 1984, Sherman made an "offer of proof" alleging that agent Cox "was aware" that: (a) Marzahl and Source 6 "were one and the same person" and Marzahl was cooperating with state and federal law enforcement agencies; (b) Marzahl was not engaged in cocaine trafficking; and (c) Marzahl was a government informant and not a suspect in a criminal investigation.[2]

The defendants did not meet their burden of presenting a "definite, specific, detailed, and nonconjectural" pre-

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2. Sherman executed a third declaration on September 12, 1984, one day before the conclusion of the September 1984 hearing. He requested a "full" *Franks* hearing on the basis of the testimony offered by Lehtola on the first day of the hearing. He also realleged the allegations regarding Marzahl.

liminary showing to warrant a *Franks* hearing. *Licavoli*, 604 F.2d at 621 (citation omitted). As to the allegations regarding Marzahl, the Sherman declaration offered general, conclusory and unsubstantiated allegations about what Cox "knew," "believed," and "was aware" of at the time he prepared his November 1983 and subsequent affidavits. Sherman provided no detail and offered no corroboration to support his "offers of proof" that Marzahl was not subject to investigation and was willing to infiltrate the Mobley organization, and that Cox had engaged in "deliberate misrepresentations." These generalized allegations do not satisfy the requirements for a *Franks* hearing. *See, e.g., United States v. Marcello*, 731 F.2d 1354, 1358 (9th Cir. 1984) (affidavit failed to provide a specific offer showing falsehood); *United States v. Southard*, 700 F.2d 1, 10 (1st Cir.), *cert. denied sub nom., Ferris v. United States*, 464 U.S. 823 (1983); *United States v. Brooklier*, 685 F.2d 1208, 1221-22 (9th Cir.), (allegation of failure to list individual as paid informant in affidavit did not show recklessness or intent), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Botero*, 589 F.2d 430, 433 (9th Cir. 1978) (no showing of bad failth), *cert. denied*, 441 U.S. 944 (1979). *See also Stanert*, 762 F.2d at 782-83 (involving unsubstantiated allegations and request for *in camera* hearing). Further, as the government points out, the allegations that Source 6 and Marzahl were "one and the same," and that Marzahl was both a local informant and subject to an FBI investigation, reveal no inconsistency in the Cox affidavit: this is fully consistent with the language of the November 1983 Cox affidavit and the government's own statements. And in any event, a showing of inconsistency alone does not satisfy the substantial preliminary showing requirement. *See, e.g., United States v. Moore*, 522

F.2d 1068, 1073 (9th Cir. 1975), *cert. denied,* 423 U.S. 1049 (1976). "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Franks,* 438 U.S. at 171. The Sherman "declaration" of September 5th does not satisfy this requirement.

As to the allegations regarding Lehtola, the Sherman-Lehtola declarations of August 6th and September 4th provided no factual or corroborative support for any of the allegations made therein. The August 6th declaration states that agent Cox "was aware" of Lehtola's general availability and willingness to help the investigation and that he failed to speak with her. The declaration alleged that Cox knew Lehtola was dissatisfied with her "passive role" in the investigation. At most, these allegations make out a colorable claim that Cox was negligent in failing to investigate Lehtola's alleged availability and unhappiness. *See, e.g., United States v. Miller,* 753 F.2d 1475, 1477-78 (9th Cir. 1975) (allegation of failure to investigate backgrounds of informants only alleges negligence); *United States v. Ritter,* 752 F.2d 435, 439-40 (9th Cir. 1985) (allegation of omission by affiant only shows negligence); *United States v. Scherer,* 523 F.2d 371, 377 (7th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976). *Compare Chesher,* 678 F.2d at 1360-62 (involving multiple corroboration in addition to detailed statement by defendant). Lehtola's uncorroborated allegation that Cox intentionally failed to return her calls also does not satisfy the requirement of a substantial preliminary showing.[3] *See, e.g., Southard,* 700 F.2d at 10 (blanket

3. The testimony presented at the September 1984 hearing revealed that these calls were made after Mobley was arrested. *See infra* section B.

allegations of recklessness or falsehood do not warrant *Franks* hearing; defendant failed to offer corroboration); *accord United States v. Mastroianni,* 749 F.2d 900, 908-10 (1st Cir. 1984). Finally, although the August 6th and September 4th declarations professed that Lehtola was "intimately familiar" with the Mobley enterprise, neither Lehtola nor Sherman offered any facts demonstrating that knowledge, or that this knowledge would be demonstrated or proved at the *Franks* hearing. *See, e.g., Marcello,* 731 F.2d at 1358; *Brooklier,* 685 F.2d at 1221-22. These declarations and offers, therefore, fall short of the substantial preliminary showing mandated by *Franks.*

The defendants claim agent Cox falsely stated in his affidavit of August 21, 1984 (executed in response to the defendants motions to suppress) that "[at] no time was I informed that Lehtola wanted to make undercover purchases from Alan Mobley, nor did I ever have an indication that she was intimately familiar with Mobley's entire operation or that she wanted to introduce undercover officers to Mobley." Defendant Alan Mobley offered (by proffer, September 13, 1984) selected transcripts of conversations between Lehtola and Huntington Beach police officers made on December 10 and December 14, 1982, which transcripts Cox acknowledged he received in December 1982 shortly after the conversations occurred. The transcripts reveal that Lehtola told Huntington Beach police she would be willing to buy drugs from Alan Mobley but she did not know where he lived and did not have any personal contacts to locate him. The transcripts, however, do not indicate that Lehtola was "intimately familiar" with the Mobley organization, or that she could introduce agents to Alan Mobley or his

cohorts. At most, Lehtola indicated she would be willing to "work" with local police and buy drugs from Alan Mobley if she could find him. These statements, however, were made in December 1982; Cox's affidavit seeking a court order authorizing the wiretap was prepared in November 1983. Even if Cox misstated in his affidavit of August 1984 his understanding of Lehtola's willingness in December 1982 to aid the investigation, this does not contradict the statements made by Cox in his November 1983 and subsequent affidavits that *as of November 1983* Lehtola was unwilling to cooperate with investigators. Indeed, officer Carl Vidano of the Huntington Beach police department stated in his declaration that in January 1983, one month after the December conversations, Lehtola emphatically stated she wanted "nothing to do" with the investigation and that thereafter she continually refused to cooperate with the investigation. Vidano acknowledged in his declaration that Lehtola had expressed a willingness to help the investigation in December 1982 but changed her mind one month later. Lehtola offered only a general and uncorroborated statement (in her affidavit) that she was willing to cooporate with investigators from December 1982 until May 1984. Lehtola's general and uncorroborated statements do not warrant a *Franks* hearing. *See, e.g., Licavoli,* 604 F.2d at 621; *Southard,* 700 F.2d at 10.

B.

Adequacy of the September 1984 Hearing

The defendants maintain that their declarations and offers of proof satisfied the requirement of a substantial preliminary showing, that they were entitled to a "full" *Franks* hearing, and that the district court and this court

may not consider evidence presented at the September 1984 "pre-*Franks*" hearing to support the finding that the defendants were not entitled to a "full" *Franks* hearing. We do not agree.

The defendants have cited no authority indicating that a district court is precluded from holding a hearing to assess the validity and credibility of affiants before holding a "full" *Franks* hearing. In contrast, the government has cited numerous cases (from this circuit and others) in which district courts have held such hearings. *See, e.g., United States v. Whitten,* 706 F.2d 1000, 1018-19 (9th Cir.), *cert. denied,* 104 S. Ct. 1593 (1984). Our own research confirms the government's position. *See, e.g., United States v. Reed,* 726 F.2d 339, 341-42 (7th Cir. 1984); *Mapp v. Warden,* 531 F.2d 1167, 1173, *cert. denied,* 429 U.S. 982 (1976). Common sense supports the district court's action. Given the conclusory and dubious "offers of proof" presented by the defendants, the district court's desire to assess the validity of the affiants before expending further judicial resources on a "full" *Franks* hearing is completely understandable.

Further, contrary to defendents' counsels' representations at oral argument, the record does not indicate that the September 1984 hearing was limited solely to the validity of the Lehtola "declaration." The district court repeatedly stated that the purpose of the hearing (which ran three days) was to assess the validity of *all* the affiants. Nine witnesses, including agent Cox, testified at the hearing; contrary to the representations of counsel, Cox was cross-examined by several defense attorneys and was subject to wide-ranging questioning. In support of their contention that the hearing was "limited," several

of defendants' counsel have quoted from select portions of the transcript. This tactic is unpersuasive and unhelpful. For example, some of the defendants note that the district court prevented them from introducing all of the December 10th and December 14th recordings. They ignore, however, the fact that the district court was willing to allow introduction of relevant and contested portions of those conversations. The defendants failed to lay an adequate foundation for wholesale admission. Similarly, some of the defendants note that the district court would not permit general questions regarding the personal relationship between one of the affiants and Lehtola. They ignore the fact that the court allowed a limited inquiry about the relationship relevant to the affiant's credibility and on matters covered in his affidavit. The district court understandably was not willing to permit repetitive or generalized questioning from the many attorneys for the defendants in this case. The record simply does not support the defendants' contention that they were "handcuffed" and were not permitted to "tell their story."

The testimony presented at the September 1984 hearing removes any doubt whether the defendants made a substantial preliminary showing to warrant a *Franks* hearing. Lehtola admitted she had never talked to Cox and that she attempted to call him in May 1984, *after* Mobley was arrested. She displayed little understanding of the Mobley organization and virtually no familiarity with most of the individuals subject to the investigation. Lehtola asserted she could have helped the investigation by buying drugs from Alan Mobley or helping "an FBI agent or narcotics agent . . . through a delicate fashion into it [the Mobley organization] and they could work

their way in." This did not contradict Cox's statement in the November 1983 affidavit that infiltration would be time-consuming and dangerous. Lehtola also failed to demonstrate that she was capable of helping the investigation. Further, at the hearing, the defendants failed to impeach the credibility of the government's affiants who testified and repeated the statements made in their affidavits that Lehtola had refused to cooperate with the investigation after January 1983 and was not capable of helping the investigation. Agent Cox testified and reiterated the statements in his affidavits that Lehtola was not available, and would not help the investigation. He also reiterated that although Marzahl had given information to local police, he was not an FBI informant and could not be used in the investigation.

It is not necessary to review all of the evidence presented at the September 1984 hearing. The government's brief accurately sets out this evidence. *See* Appellee's Brief, 36-48, 87-89. We agree with the district court that Lehtola was not credible, that the allegations regarding Marzahl were without corroboration or foundation, and that the defendants failed to make a substantial preliminary showing entitling them to a *Franks* hearing.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.	84-5331	84-5337
	84-5332	84-5338
	84-5333	84-5341
	84-5334	84-5343
	84-5335	84-5348
	84-5336	86-5230

D.C. No. CR 84-516-MR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM McCAHILL, et al.,
Defendants-Appellants.

(Filed January 15, 1987)

O R D E R

Before: SCHROEDER, CANBY and THOMPSON,
Circuit Judges.

All petitions for rehearing, and all suggestions for rehearing en banc, heretofore received by the clerk of this court are ordered filed.

Defendant-appellant Mobley's motion to permit late filing of his joinder in co-appellant-co-defendant Restrepo's petition for rehearing and suggestion for rehearing en banc is granted.

The panel as constituted in the above cases has voted unanimously to deny all of the petitions for rehearing and to reject all of the suggestions for rehearing en banc.

The full court has been advised of all of the suggestions for en banc rehearing and no judge of the court has requested a vote on any of the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

All petitions for rehearing filed by the appellants-defendants are DENIED and all suggestions of the appellants-defendants for rehearing en banc are REJECTED.